IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Plaintiff,

v.

STATE OF UTAH,

Defendant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR AMICUS CURIAE

State of California (by and through its State Lands Commission and its Attorney General), Arizona, Colorado, Montana, Nevada, New Mexico, Oregon and Washington

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OTHER AUTHORITIES CITED

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Appen. 10a-53a) is reported at 586 F.2d 756. The opinion of the district court (Pet. Appen. 54a–79a) is not reported.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C section 1254(1), this Honorable Court has granted the petition of Cecil T. Andrus, Secretary of the Interior, for a writ of certiorari to review a decision of the United States Court of Appeals for the 10th Circuit.

The State of California, by and through its State Lands Commission and its Attorney General, George Deukmejian, and the other states joining with it respectfully submit this brief as amicus curiae under authority of rule 42(4), United States Supreme Court Rules.

INTEREST OF AMICUS CURIAE

California, like most of the other western states, was granted the sixteenth and thirty-sixth section in every township to be held and administered in trust for the perpetual benefit of the public schools. (Act of March 3, 1853, 10 Stat. 244.) The trust nature of the school lands grant is, as the court below indicated, unique, resembling in some degree the public trust in which the states hold their sovereign land. (*Alabama* v. *Schmidt* (1914) 232 U.S. 168.) In the event any of the lands within this specific "in place" grant are not available by reason of preexisting rights of others, the states have historically had the right to select other land in lieu of such preempted acreages. (*McCreery* v. *Haskell* (1886) 119 U.S. 327.) The State of California has, as petitioners point out, outstanding rights to select approximately 180,000 acres of such school-indemnity lands. Other western states have corresponding interest. (Pet. for Cert., p. 12, fn. 9.)

Should this Court reverse the decision of the 10th Circuit Court of Appeals, it would have far reaching impacts not only on Utah but also on California and all of the western states. It has been over 100 years since

California received its school land grant. The other western states joining in this brief have grants of similarly long duration. Throughout this period, California has made indemnity selections on the basis of equal acreage without considering values of parcels used as base lands (those not received in place for which the state is entitled to indemnity) or the values of those parcels selected —equal acreage has always been the rule.

Throughout this period there have been changes in the public domain by virtue of both federal reservations for national parks, national forests, power sites, etc., and also both mineral and nonmineral private entries. These reservations and entries have taken many of the most valuable lands in the public domain out of the selection process.

After 100 years of equal acreage selections the Secretary now wants to impose a new rule in the selection process, the so-called "equal value" rule. Even this is a misnomer, however, for equal value implies some sort of reciprocity. The rule proposed by the Secretary does not prevent the states from giving up base lands more valuable than those selected, but it does prevent the states from selecting those lands whose value exceeds the value of the lands the state is giving up. Additionally, the states can only select from those lands left over after federal reservations and private entries. What the Secretary is in essence trying to do is change the rules of the game after seven innings have already been played.

Furthermore, it is only by violating a compact or contract made between the United States and the states

that the Secretary can impose such a rule. As the court of appeals stated:

> "The Secretary argues, it seems, that the affected 'Land Grant' states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the 'school lands' granted—or those selected 'in lieu'—while the United States Government is not bound to the performance of those covenants it agreed to in consideration for Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in *State of Wyoming* v. *United States, supra.*" (586 F.2d 756, 772, (1978).)

California and the other western states have waited patiently for over 100 years to receive their school lands. Should this Court reverse the decision of the 10th Circuit Court of Appeals and uphold the Secretary's contentions it may be another 100 years before these grants can be satisfied. Therefore, California and the other states joining in this brief respectfully request this Court consider the arguments contained herein and affirm the decisions of the district court and the Court of Appeals for the 10th Circuit.

QUESTIONS PRESENTED

1. Do the provisions of the Taylor Grazing Act confer discretion on the Secretary of the Interior to impose conditions on indemnity land selections made by states in addition to those set forth in sections 851 and 852, 43 United States Code?

2. Does the authority to classify lands set forth in section 7 of the Taylor Grazing Act (43 U.S.C., § 315(f)) give the Secretary the power, uncontrolled by any statutory standards to compare the value of lost base lands with the value of indemnity selections made by a state pursuant to its congressional grant and decline to approve state selections if he determines their values to be disparate?

SUPPLEMENTARY STATEMENT OF THE CASE

The factual background of this case is not in dispute. Pursuant to and in accordance with the requirements of sections 851 and 852 of title 43, United States Code (§§2275 and 2276 of the rev. stats.), the State of Utah between September 1965 and November 1971, selected 194 parcels of public lands as indemnity for losses to its school land grant occasioned by federal preemption or private entry prior to survey. All the selected lands were located within the exterior boundaries of a grazing district. Little or no action was taken by the Interior Department. Nearly nine years after the first selection was filed, none of the selections had been either approved or disapproved.

Early in 1974, however, things began to happen. First, the Secretary announced that he intended to offer some of the tracts selected by Utah for leasing for oil shale development. After some dispute between Utah and the Secretary, the parties entered into an agreement whereby Utah would succeed to the interest of the United States under the leases if it successfully obtained the selected lands.

Second, and more important, in February 1974, the Secretary, in a letter to Governor Rampton of Utah announced that seven years earlier, in 1967, under the discretionary powers granted him by section 7 of the Taylor Grazing Act, the Secretary had adopted an "equal value" policy in school indemnity selections and that while the department was still not prepared to adjudicate Utah's selections, the equal value policy would be applied to the selections made by Utah. On March 4, 1974, Utah filed suit.

Both parties stipulated there were no contested issues of fact and both moved for summary judgment.

The district court granted Utah's motion. It held that the Taylor Grazing Act did not confer on the Secretary any discretion with respect to school indemnity selections and even if it did, any discretion the Secretary had was limited to determining whether the selections were in compliance with the provisions of sections 852 of title 43 of the United States Code.

The Secretary appealed and the United States Court of Appeals for the 10th Circuit affirmed. The court of appeals held that the criteria governing the discretion of the Secretary in approving school indemnity selections were set forth in the case of *Wyoming* v. *United States* (1921) 255 U.S. 489 and *Payne* v. *New Mexico* (1921) 255 U.S. 367; that section 7 of the Taylor Grazing Act could not be construed to grant any discretion to the Secretary with respect to school indemnity selections; and as long as Utah had complied with criteria and requirements

contained in sections 851 and 852 of title 43 of the United States Code, it was entitled to have the selected lands listed to it.

The Secretary then petitioned this Court for hearing. Certiori was granted on June 11, 1979.

SUMMARY OF ARGUMENT

The grants of the newly admitted states of lands for the support of common schools date back to 1802. These grants are unique. They are not founded on the beneficence of Congress but upon a solemn bilateral agreement or compact between the United States and each new "public land" state as it entered the Union. The terms of this compact were that the United States would grant to each state a specified number of sections of land in each township within the state and in return the states promised not to tax federal lands within the state and to hold the lands in trust for the purposes upon which they were granted. The purpose of these grants was to promote a degree of equality between the newly admitted states and the older states. Therefore, these grants may be considered to be part and parcel of the constitutionally mandated "equal footing doctrine."

In 1802, with the first school land grant, Congress recognized that there would be situations where the specifically numbered section would not be available to the state because of prior settlement or sale or federal reservation, therefore Congress as an integral part of the school land grant, appropriated and granted additional lands as indemnity for those lost. In 1826, Congress

enacted a general indemnity statute establishing the requirements for all states. This statute has been amended from time to time and presently the prerequisites for such selections are contained in sections 851 and 852 of title 43 of the United States Code. Throughout the entire history of the indemnity selection process the essential feature of the statutes has remained exactly the same as it was in 1802—indemnity selections are to be made on an equal acreage basis.

Prior to 1967, the Secretary of the Interior did not believe himself authorized to consider disparity of values between base lands (i.e., lands unavailable because of pre-existing rights or federal reservation) and lands selected. (E.g., memorandum of September 14, 1962, Associate Solicitor, Div. of Pub. Lands, to Director, Bur. of Land Management, Utah's Appendix B; Memorandum of February 11, 1943, Comr. of the Gen. Land Off. to the Sect. both cited in *Utah* v. *Kleppe* (1978) 586 F.2d 756, 762–763.) In 1967, the Secretary reversed himself, and adopted the policy that, relying on his discretion, he would refuse to approve indemnity applications that involve "grossly disparate values." With this one stroke of policy the Secretary reversed the 165-year-old statutory rule that indemnity selections are predicated on equal value. Furthermore, the Secretary took this action in spite of the fact that only a year earlier Congress had emphatically rejected the Secretary's attempt to get sections 851 and 852 amended to institute an equal value rather than equal acreage. Thus it appears that the Secretary took it upon himself to accomplish administratively what Congress declined to do legislatively.

The Secretary took this action claiming it was within his "discretion." But this Court emphatically established in the cases of *Payne* v. *New Mexico, supra,* 255 U.S. 367 and *Wyoming* v. *United States, supra,* 255 U.S. 489 that the Secretary's duties with respect to school indemnity selections are not discretionary in nature but are merely ministerial. Unless these cases have been overruled they are clearly controlling and the Secretary has no discretion whatsoever with respect to school indemnity selections.

The Secretary contends that in enacting the Taylor Grazing Act, Congress legislatively overruled and gave the Secretary broad and virtually unlimited discretion in approving state indemnity selections.

The Taylor Grazing Act has no applicability to state indemnity selections for a simple reason—in section 1 of the act, Congress exempted school indemnity selections along with all other grants to the states from the purview of the act.

Section 1 of the act states:

> "Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, not to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State." (43 U.S.C. §315.)

The clear and unequivocal language used in the section exempts *any* lands which would be a part of *any* grant to *any* state. Nothing could be clearer. Indeed, it appears that this language was specifically added by Congress in response to concerns by the state that the indemnity selection rights would be affected by the act. Such a construction is entirely consistent with the avowed purpose of the act to stop the destruction of the public rangelands through homesteading.

Additionally, the Secretary's major premise is faulty. He asserts that the 1934 act effectively terminated all school indemnity selection rights but in the 1936 amendment to section 7 of the act restored those rights but made them subject to secretarial discretion.

In the above-quoted language of section 1, Congress again in clear and unequivocal language added an additional safeguard for the states. Unless the act *expressly* provides otherwise, the states' rights to "initiate" school indemnity selections remain as before. The 1934 act made no mention at all of indemnity selection rights, therefore, they were not diminished, restricted or impaired by the provisions of the Taylor Grazing Act.

Furthermore, the 1936 amendment to section 7 is ambiguous. While it speaks generally of the selection of lieu lands, the primary thrust is to uses and school indemnity selections are not uses. The Senate report stated the amendment was designed to restore *private* lieu selection rights. This is the only reasonable construction which can be given to the statute. To construe section 7 to apply to school indemnity selections would violate

several precepts of statutory construction; that the specific requirements of sections 851 and 852 of title 43 of the United States Code must control over the general language of section 7 and the school land grants are to be liberally construed in favor of the states.

Another reason the Secretary's contention that this Court's decisions in *Payne* v. *New Mexico* and *Wyoming* v. *United States* have been legislatively overruled must fail is that recent judicial decisions have affirmed that these cases are still good law even after enactment of the Taylor Grazing Act.

Finally, even assuming that the Secretary does have discretion, this discretion does not and cannot give him the power to impose an equal value rule. The case of *Bronken* v. *Morton* (9th Cir. 1973) 473 F.2d 790, holds that even where the Secretary has discretion to classify lands under section 7 of the Taylor Grazing Act he cannot impose an equal value rule. Even if this case does not collaterally estop the Secretary from claiming authority to impose an equal value rule, it is a clear holding that the Secretary cannot impose such a rule even where he has discretion.

The district court and the court of appeals carefully considered and rejected the Secretary's arguments. We respectfully request this Court do the same.

ARGUMENT

I. School Land Grants are to be Liberally Construed Because they are Unique—They are Part of a Bilateral Compact Between the States and the United States and are Held in Trust by the States

Proper understanding of the issues involved in this case requires consideration of the nature and purpose of the grant of school lands to the states with the concomitant and integral right of the states to select indemnity or lieu lands for those lost through no fault of the states.

A. The Purpose of the School Land Grant Was to Give Revenue to the Public Land States for the Support of Schools in Lieu of Taxation of Federal Lands

Following the Revolutionary War, the thirteen colonies became in essence thirteen sovereign and independent nations and, as such, had complete control of the lands within their borders. When they adopted and ratified the Constitution, thereby becoming the original thirteen states, there were no "federal" lands within their borders. All of the land was either owned by the states or by private parties and, therefore, all the land within a particular state was subject to taxation by the states. Taxes on these lands could be used for a variety of essential governmental services including the establishment and maintenance of a system of public schools. Later on, however, in new states seeking admission to the Union, the United States claimed federal ownership of these territories by virtue of treaties, state cessions or purchase. It was common for the federal government to

condition admission upon recognition of such federal ownership within the state, and to extract a promise from the newly admitted state not to tax such lands. (E.g., Act for the Admission of California Into the Union, 9 Stat. 452; but see *Coyle* v. *Oklahoma* (1911) 221 U.S. 559; *Pollard's Lessee* v. *Hagan* (1845) 44 U.S. (3 How.) 212, 221.) Such federal ownership—whether validly extracted or not, created a practical problem with respect to generation of sufficient tax revenue for providing essential government services such as the establishment and maintenance of a public school system. One obvious solution would have been to give the states all the public lands withheld by the government.[1] But this solution had some definite drawbacks.[2] So Congress decided to enter into a compact with each newly admitted state whereby the states would pledge not to tax federal lands and in return Congress would grant each state a certain amount of the public lands within its borders. These so-called school lands could then be sold or leased by the state to generate revenues for the establishment and maintenance of a public school system. By this method a certain degree of equality between the older states and those newly admitted was achieved.

Beginning with Ohio in 1802, as the first true "public land" state, Congress carried this plan into effect. Ohio pledged not to tax public domain lands located within the state and in return Congress granted it section 16

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[1] For history of the school land grants see Gates, "History of Public Land Law Development," Public Land Law Review Commission, ch. XII (1968).

[2] It appears that Congress was concerned it would not have been able to reduce the national debt without the revenues generated from the sales of public lands. (See Gates, *id.*, p. 288.)

within each township. Ohio's Enabling Act (2 Stat. 175) provides in part:

> "*And be it further enacted,* That the following propositions . . . are hereby offered . . . for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States.
>
> ". . . That the section, number sixteen, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools.
>
> ". . . *Provided always,* that the three foregoing proposition(s) herein offered, are [is] on the condition(s) that the convention of the said state shall provide, by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by Congress, from and after the thirtieth day of June next, shall be and remain exempt from any tax laid by order or under authority of the state, whether for state, county, township or any other purpose whatever, for the term of five years from and after the date of sale. (*Id.*)

Although Congress later increased the number of sections granted to the new states entering the Union (for example, California received two sections in 1853 (10 Stat. 244) and Utah four sections in 1894 (28 Stat. 107)), the essence of the school land grant remained the same —the states were required to adopt an irrevocable ordinance promising not to tax federal property and the Congress granted them lands for schools. For example,

California's grant is similar to that of Ohio and of Utah. (The text of Utah's grant is contained in brief for petn., Appen., p. la.) Section 6 of the act (10 Stat. 244) granted to California sections 16 and 36 for the purpose of public schools and section 7 of the same act granted land as indemnity for losses. Section 7 provides in part:

> ". . . That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,'[3] and which shall be subject to approval by the Secretary of the Interior." (*Id.*)

B. Acceptance by the State of a School Lands Grant Imposes a Further Obligation on the States—They are Required to Hold the Lands in Trust for the Support of the State's Public School System

In addition to the promise of the states not to tax federal lands, the acceptance of school lands by the state also entails an additional promise by the states that they

[3] The act of May 20, 1826, granted indemnity for fractional townships and established a formula whereby the amount of land which could be selected depended on the size of the fractional township. This same formula is currently contained in 43 U.S.C., § 852(b).

will hold those lands in trust for the support of the public school system. The nature of this trust was recently reaffirmed by this Court in the case of *Lassen* v. *Arizona* (1967) 385 U.S. 458. In that case, the Land Commissioner of Arizona attempted to grant, without compensation, material sites and rights of way over certain school lands to the Arizona highway department, citing both the public purpose served by the highway and the potential increase in value of the remaining portions of the school lands. This Court rejected these contentions and held that the lands granted to Arizona were impressed with a trust for the benefit of the public school system and, therefore, the state could only use the land and materials upon the payment of the full, fair market value of the materials and rights-of-way taken. (385 U.S. at p. 469.)

C. The School Land Grants are part of the Bilateral Compact Between the States and the Federal Government

It appears, therefore, that the grants to the state of school lands are a part of a bilateral compact between the states and the federal government whereby the states received grants from the federal government and in return pledged not to tax federal lands and also pledged to hold these lands in trust for the purposes for which they were granted. The Ohio statute expressly recognized this compact when it stated that if accepted by the state, the school grant "shall be obligatory on the United States." The bilateral nature of this compact has also been recognized in judicial decisions. In *State of Nebraska* v. *Platte Valley Public Power & Irrigation Dis-*

trict (Neb. 1946) 23 N.W.2d 300, the court expressly recognized that the grant of school lands and its acceptance by the state constitutes a solemn compact between the United States and the state and in *Cooper* v. *Roberts* (1855) (18 How. 173), this Court described the school land grant to Michigan as a "compact" between Michigan and the United States.

D. The School Land Grant May be Part of the Equal Footing Doctrine

Under the equal footing doctrine, newly admitted states must be accorded essentially the same rights as the original states. This is not a mere matter of congressional policy but is required by the Constitution itself. (See, e.g., *Oregon* ex rel *State Land Bd.* v. *Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363; *Pollard's Lessee* v. *Hagan, supra,* 44 U.S. (3 How.) 212; *Shively* v. *Bowlby* (1894) 152 U.S. 1.) Whether retention by the United States of lands amounting in many states to well over half of their total areas complies with this constitutional mandate is questionable. Assuming, however, that the United States could retain grossly disparate holdings, it appears that the school land grants were an effort to comply with the equal footing doctrine for the purpose of giving the newly admitted states a measure of equality with the original states whose lands were all subject to state taxation. In addition, the "equal footing" nature of these grants, was at least impliedly recognized by this Court in *United States* v. *Morrison* (1916) 240 U.S. 192, 205 and in *Heydenfelt* v. *Daney Gold and Silver Mining*

Co. (1876) 93 U.S. 634, 638, where this Court interpreted the school land grant of one state with reference to that of another state.

E. The Statutes Governing School Indemnity Selections Have Always Specified an Equal Acreage Exchange

With the very first school land grant to Ohio in 1802, Congress recognized that there would be instances where the specific section or sections of land granted to the states would be unavailable for a variety of reasons. As an integral part of the school land grant to Ohio, therefore, Congress also provided that where the specifically numbered section of land within a particular township was unavailable, other lands of equal acreage were granted. (*Supra,* at p. 23.)

In 1826, Congress enacted the first general school indemnity statute. It has been amended from time to time (for example in 1958, Congress allowed the states to select mineral lands provided certain conditions were met) and it was the forerunner of what are now sections 851 and 852 of title 43 of the United States Code. In spite of these amendments, the essential principle of the statute has been the same through the years—the selection process is to be done on an *equal acreage basis.*

As the statutes presently read, section 851 appropriates and grants to the states lands of "equal acreage" where losses to school land sections in place occur for a variety of reasons and provides that the states may select such lands in accordance with the provisions of section 852.

Section 852 sets forth the standards for state selection of other lands in lieu of those granted sections in place. Insofar as is relevant here, that statute permits the selection of such lands from any unappropriated surveyed or unsurveyed public lands within the state where such losses or deficiencies occur subject to the following restrictions:

> "(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;
>
> "(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State . . . ." (43 U.S.C. § 852.)

The Secretary has, in the past, asked Congress to amend section 852 to change the 150-year-old equal acreage rule. In 1966, sections 2275 and 2276 of the Revised Statutes (43 U.S.C., §§ 851–852) were amended to liberalize the indemnity selection program. (P.L. 89-470; 80 Stat. 220.) In its report on this legislation, the Department of the Interior stated:

> "The bill does not deal with the equal value concept with respect to lands valuable for leaseable minerals involved in State selections. We have previously recommended language designed to resolve this problem. Our primary purpose was to inform the Congress of the facts, and to give the Congress an opportunity to legislate on the subject if it wishes to

do so. In the House of Representatives, H.R. 16 embodies the equal value concept. The House committee tabled that bill after hearings, and reported H.R. 5984 without the equal value concept. The problem was called to your attention in our report on S 1883. We believe the subject merits consideration by your committee. In our prior reports we stated a preference for legislation which included this concept, but indicated no objection to the enactment of a bill without it." (Sen. Rep. No. 1213, 2 U.S. Code & Adm. News, 89th Cong., 2d Sess. (1966) at p. 2326.)

Congress rejected the Secretary's amendment and elected to retain the equal acreage criteria.

II. The Secretary's Duties With Respect to School Indemnity Selections were Set forth by This Court in *Payne* v. *New Mexico* and *Wyoming* v. *United States*—These duties are strictly Ministerial in Nature

The question of whether the Secretary has discretion in approving school land selections was settled long ago by this Court in the cases of *Payne* v. *New Mexico, supra,* 255 U.S. 367 and *Wyoming* v. *United States, supra,* 255 U.S. 489.

In *Payne* v. *New Mexico,* the State of New Mexico had lost a school land section in place by reason of its inclusion in a federal reservation. New Mexico then applied for indemnity, and the selection was regular upon its face, as is the case here. Prior to final issuance of the clear list, however, the boundaries of the reservation were changed to delete the school land section in place (the base land on which New Mexico indemnity selection had been made). This Court held that New Mexico's selection was not to be defeated by such subsequent events, since its validity was to be governed by the conditions existing at the time of the selection. As this Court said:

> "The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard." (*Id.* at p. 370.)

The Secretary also asserted that because New Mexico's enabling act provided that indemnity selections were to be subject to "the approval of the Secretary of the Interior," he had discretion to approve or deny the selection. This Court disposed of this contention in short order. It said:

> "But it is said that as the selection is 'subject to the approval of the Secretary of the Interior' no right can become vested, nor equitable title be acquired, thereunder unless and until his approval is had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.

> The power conferred is 'judicial in nature' and not only involves the authority but implies the duty 'to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.' " (*Id.* at p. 371; citation omitted.)

Three weeks later this Court decided *Wyoming* v. *United States, supra*, 255 U.S. 489. In that case, Wyoming had lost a school land section by virtue of its inclusion in a national forest. Wyoming duly filed its indemnity selection. However, in the intervening years since the list was filed, the selected lands were found to be valuable because of oil deposits. Seeking to retain the lands in federal ownership because of the subsequent discovery of oil, the Secretary rejected the selection. As in the *Payne* case, this Court again affirmed that the validity of the selection depended on conditions at the time the selection was made and held that the Secretary's duties with respect to school indemnity selections were ministerial in nature. This Court said:

> "The proposal for the exchange of land without for land within the reserve came from Congress. Acceptance rested with the State and of course would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the State which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting

> or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised;—in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912." (255 U.S. 489, p. 496.)

The *Payne* and *Wyoming* cases are directly in point and dispositive of the issues involved in the current dispute. The state's right to select indemnity lands is to be exercised at the discretion of the states—not the Secretary of the Interior. If the selection lists are filed in accordance with the provisions of 43 U.S.C. section 852, as determined by the Secretary in his *ministerial* adjudication, he is required to approve them. He has no discretion to approve or deny them on any basis other than they do not comply with the requirements of section 852.

III. The Taylor Grazing Act did not Confer Discretion on the Secretary of Interior to Impose Additional Conditions Upon State School Indemnity Selections

Contrary to the Secretary's contention the Taylor Grazing Act (43 U.S.C., § 315, et seq.)—or more specifically a 1936 amendment to the act—did not overrule this Court's decision in the *Payne* and *Wyoming* cases. For a variety of reasons, the Taylor Grazing Act cannot be construed to give the Secretary any discretion with respect to school indemnity selections.

The Taylor Grazing Act (48 Stat. 1270) was passed by Congress in 1934. Its purpose was to:

". . . halt the destructive use of the public rangelands and to prevent the continued breakup of natural grazing areas by homesteading, which was taking the land with access to water and leaving useful grasslands without any water. . . ." (*History of the Public Land Law Development,* Public Land Law Rev. Com., ch. XXI, p. 607.)

The Secretary's sole contention in this case is that this act with its avowed purpose of stopping the destruction of the public lands through homesteading, cut off all school indemnity selection rights, and that Congress in 1936 by amending section 7 of the act restored those rights but made them subject to the Secretary's discretion. These contentions are not supported by the language of the statute in question. In the Taylor Grazing Act, Congress expressly and in clear and unequivocal language exempted school indemnity selections; the Secretary's underlying premise that the act completely cut off all school indemnity selections is erroneous; the 1936 amendment to the Taylor Grazing Act cannot be construed to apply to school indemnity selections; and recent judicial decisions have affirmed that the holdings in *Payne* v. *New Mexico* and *Wyoming* v. *United States* are still valid law in spite of the enactment of the Taylor Grazing Act.

A. Section 1 of the Taylor Grazing Act in Clear and Unequivocal Language Expressly Exempts School Indemnity Selections

The primary reason the Taylor Grazing Act does not confer discretion on the Secretary to approve or deny school indemnity selections is simple. In 1934, when

Congress passed the Taylor Grazing Act, it expressly exempted school indemnity selections from the operation of the act. This language is found in section 1 of the act.

Section 1 of the Taylor Grazing Act (43 U.S.C., § 315) provides that "nothing in this chapter shall be construed to . . . affect *any* land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of *any* grant to *any* state." (Emphasis added.)

The language of section 1 is clear and unequivocal. It applies to any lands which would be a part of any grant to any state. As had been shown, school indemnity selections were granted to the states by Congress at the same time and in the same statutes by which Congress granted school lands to the states. They are an integral and essential part of the school land grant to the states. They are part and parcel of the sacred and bilateral compact between the United States and the states. School indemnity lands are lands which are part of the congressional grant of school lands to the states.

But the Secretary contends this language should be limited to school lands in place. In suggesting that this language should be read to apply only to school land sections in place, the Secretary is, in essence, asserting that the language of section 1 should be read as "any land which would have been part of any grant to any state *except for school indemnity selections.*" Such a reading would conflict with the plain, clear, and unequivocal language Congress used. Presumably if Congress had intended to limit the exemption in section 1

to only school lands in place it could have done so by using much more restrictive language. Instead, Congress opted for the much broader language of *any* lands, *any* grant, and *any* state.

Furthermore, while there is no direct testimony or statement in the legislative history of the Taylor Grazing Act showing why this language was included in the act, there is some indication that this language was expressly included in the Taylor Grazing Act to expressly deal with the school indemnity selection process. When HR 2835, a predecessor bill to HR 6462 which became the Taylor Grazing Act, was being reviewed before the House Committee on the Public Lands, a letter from the General Land Office Commissioner, Mr. Johnson, was read into the record. This letter stated in part that:

> "A number of the States have objected upon the theory that the establishment of a grazing district would restrict the State in its indemnity selections." (To Provide for the Orderly Use Improvement, and Development of the Public Range, Hearings before the Committee on the Public Lands House of Representatives, 73rd Cong., 1st Sess. on H.R. 2835 and 73rd Cong. 2nd Sess. on H.R. 6462.)

This report was considered as part of the record in the House hearings on HR 6462 which later became the Taylor Grazing Act. (*Id.* at p. 66.) Prior to passing HR 6462 out of committee, it was amended to add the language exempt from the operation of the act any lands which would be part of any grant to any state. Therefore, while there is no direct testimony to the effect that the purpose of this amendment was to specifically exempt school indemnity selections, we do know that the states' concern that the Taylor Act would somehow restrict their school indemnity rights was part of the record in considering HR 6462 and that Congress added extremely broad language exempting any grant to any state from the operation of the act. Given the broad, clear and unequivocal language Congress used it seems almost certain that HR 6462 was amended to meet the state concerns expressed in Commissioner Johnson's letter.[4]

1. Testimony of Additional Witnesses Well Versed in the Law, Shows that Following the Amendment of HR 6462, the Committee's Deliberations Were not Concerned with Indemnity Selections But Instead Focused on the Exchange Provisions of Section 8

The Secretary has cited the testimony of several witnesses (among them the Governor of Wyoming) before the Senate Committee in support of his contention that the broad language in section 1 should be construed to only apply to school land grants in place. (Pet. Brief, p. 38.) This testimony was given after section 1 of HR 6462 had been amended to add the language exempting from the provisions of Taylor Grazing Act any lands which would be a part of any grant to any state and no such

[4] The Secretary seeks to draw the opposite inference from these facts. (Pet. brief, p. 38, fn. 17.) What the Secretary fails to point out is that this letter was part of the record the House Committee had before it when it considered HR 6462. At the time these concerns were brought before the House Committee, HR 6462 did not contain the broad language exempting any grants to the state, but this language was added prior to passing the bill out of the committee.

inference can be drawn from it. When examined in full, this testimony supports the opposite conclusion. It shows that following the amendment to section 1 of the act the state's concerns were allayed and they then focused in on the exchange provisions of section 8 of the act.

On the final day of hearings, both Governor Miller of Wyoming and Mr. George Fisher, Executive Secretary of the State Land Board of Utah testified. (Governor Miller's testimony is contained in S. Hgs. on HR 6462, *supra,* at pp. 195–209 and Mr. Fisher's testimony at pp. 209–216.) This testimony came after the House of Representatives had already amended HR 6462 to include the broad exception for all state grants. (*Id.,* at p. 1.) As is apparent from a full reading of their testimony, both men were familiar with the bill and with the land grants to the states. Both were also primarily concerned about the effect of the Taylor Grazing Act on school land sections in place to which the state had already received title. The reason for this concern was that the school land sections to which the states had already received title were, to a large extent, isolated tracts surrounded by a sea of federal lands. If these federal lands were then included within a grazing district and a federal grazing lease was issued to a private party, the only way the state could prevent trespass by the federal lessee and obtain any beneficial use of that portion of the school lands within the district would be to fence them—an obviously impossible task. The inclusion of these school lands within a grazing district and the issuance of leases to private parties would substantially decrease the value of

the state school land sections which the state had already received in place and in some cases, render them worthless. Therefore, these witnesses were vitally concerned that the exchange provisions of section 8 be made mandatory and not discretionary.[5]

Given the knowledge of these men it seems apparent that if they had thought the state would lose all school indemnity selection rights by virtue of the 1934 act they would have said so. But they did not. In fact Governor Miller expressly stated that he thought these rights would continue:

> "I think there should be some definite protection to the States in this bill in this particular: When the forest reserves were established by law the right was given to the States to exchange school sections within the boundaries of forest reserves for unappropriated public domain outside the reserves. That right remains. We have not in Wyoming exhausted all of that right. That is to say, we still have the right of selection under that law. If these grazing districts are established we will be very, very much restricted in that right to exchange our lands now in the forest reserves for lands outside the reserves, because those lands once established in grazing districts will render it very difficult to make such selections.
>
> "If I may illustrate for the benefit of the committee: We will say that Mr. Brock over here, a cattleman, finds over in Johnson County a tract of 40 or 80

[5] Indeed following passage of the Taylor Grazing Act, the Secretary denied that these provisions in section 8 were mandatory. Congress amended the statute to make clear that they were mandatory and on the strength of a solicitor's opinion the Secretary reluctantly agreed. (See, e.g., 61 I.D. 270.)

or 320 acres of advantageously located public domain that he can use in connection with his general ranching operations. He can apply to the State to have that land selected as State land. The State will then exchange an equal area over in the forest reserve for this area down here, and lease or sell the land to Mr. Brock. If, however, these grazing districts are established then Mr. Brock is going to have control of all that area. He does not need to ask the State for any help in that area, and our sections over in the forest reserve will just stay there for all time." (To Provide for the Orderly Use, Improvement, and Development of the Public Range: Hgs. on H.R. 6462 Before the Sen. Comm. on Public Lands and Surveys, 73d Cong., 2d Sess. pp. 204–205 (1934).)

Obviously, Governor Miller felt that the states' school indemnity selection rights were adequately protected by the express exemption of section 1 of the act.

The only other testimony cited by the Secretary is that of Howard Smith who appeared before the committee representing both the State of Arizona and the Arizona Cattle Growers Association. About the best that can be said for Mr. Smith's testimony is that it is confused. Mr. Smith did say that *private* scrip or lieu selections should be authorized within grazing districts but there is nothing in his testimony which explicitly establishes that he believed the states would not be allowed to initiate school indemnity selections within a grazing district. It is also apparent that Mr. Smith was totally opposed to the Taylor Grazing Act and it is well established that speeches by opponents of legislation are to be accorded little weight in interpreting the act in question. (*Holtzman* v. *Schlesinger,* 414 U.S. 1304, 1313, n. 13; also *Woodwork Manufacturers* v. *NLRB* (1967) 386 U.S. 612, 639–640.)

There is really nothing in the materials cited by the Secretary which would alter the conclusion mandated by the clear and unequivocal language of section 1. The broad provision of this exemption was designed to the exempt state school indemnity selections as well as any other lands which would have been a part of a state grant from the purview of the Taylor Grazing Act.

2. The Language Used in Executive Order 6910 Supports the Conclusion that the Language of Section 1 Must Exclude State School Indemnity Selections from the Provisions of the Taylor Grazing Act

Following the enactment of the Taylor Grazing Act in 1934 the President issued Executive Order 6910. By its terms this order withdrew from "settlement, location, sale or entry" all the public lands in 12 western states. The language of this order is significant because a state school indemnity selection is a "selection." It is not a settlement. It is not a location. It is not a sale. And it is not an entry. Nonetheless, the Secretary contends that a school indemnity selection is an entry. The only place we have ever seen state school indemnity selections termed "entries" is in the Secretary's brief.

That the purview of Executive Order 6910 did not include school indemnity selections also is shown by statements made by a member of the Senate Committee on Public Lands and Surveys and by Assistant Solicitor

Poole of the Department of the Interior.

Following the enactment of the Taylor Grazing Act in 1934 and the issuance of Executive Order 6910; hearings were held on S 2539 to amend the Taylor Grazing Act. In the course of those hearings the subject of Executive Order 6910 came up. This discussion followed:

> "Senator CAREY. Do you understand there was any reason, Senator Adams, for an Executive order?
>
> "Senator O'MAHONEY. The Executive order, as I understand it, Senator, was merely to stop homestead entrance and other entries of the ordinary nature on the public domain.
>
> "Senator CAREY. Does not the act itself automatically stop them?
>
> "Senator O'MAHONEY. No; because there was a limitation of the acreage. This act limits the application of the Taylor Grazing Act to 80,000,000 acres of land.
>
> "Now, the Executive order had the effect of withdrawing all of the public domain from homestead entrance and other entries of the ordinary nature. For instance, of settlement and entry, except the minimum." (To Amend the Taylor Grazing Act Hgs. Before the Com. on Pub. Lands and Surveys, U. S. Sen., 74th Cong., 1st Sess. on S 2539 at p. 51 (1935).)

Not only is a school indemnity selection not an entry but it is also not "ordinary." School indemnity selections are not merely rights granted by Congress in its benevolence but are part of a solemn bilateral agreement between the United States and the states. (*Supra,* at p. 25.) School lands are held by the states subject to a solemn trust. (*Supra,* at p. 24.) These lands are not ordinary

in any sense of the word; if anything, they are unique.

Even more explicit is the statement made by Solicitor Poole before the House Committee on the Public Lands in hearings concerning the possible amendment of the Taylor Grazing Act. In his testimony, Solicitor Poole stated:

> "Mr. Poole. Yes. There was a general withdrawal order issued by the President last November. By the terms of that order and by virtue of the provisions of the law under which the President issued it, any one who had initiated a homestead entry, either by settlement or by filing an application, is fully protected; and he may proceed and makes proof or is a position to make proof on that particular tract of land.
>
> "After the withdrawal order was made, of course no right could be initiated, because the purpose of the President's proclamation was to eliminate homesteading until a classification was made.
>
> "Mr. Lemke. You protect the person who had made application, but how about the person who has just squatted and put up some buildings but has not had time or who has neglected to put in an application? What would you call initiating?
>
> "Mr. Poole. There are two ways in which a homestead is initiated. One is by physical entry. The other is by filing an application.
>
> "Mrs. Greenway. May I ask a question in that connection? I have quite a few people, especially in the area under reclamation withdrawal near Yuma and elsewhere, who have filed on mining claims and have done assessment work on their claims in this area that has been withdrawn. What is going to happen to them?
>
> "Mr. Poole. They are not affected at all. The with-

drawal order or the passage of the Taylor order did not in any wise affect mining or mining operations or entries. This public land was withdrawn, Mrs. Greenway, *only for the purpose of stopping homestead entries.*" (To Provide For The Orderly Improvement, and Development the Public Range, Hgs. before the Com. on the Pub. Lands, H.R., 74th Cong., 1st Sess. on H.R. 3019, p. 98 (1935) emphasis added.)

This interpretation of the withdrawal order as being restricted to homesteading is entirely consistent with the avowed purpose of the Taylor Grazing Act to stop the destruction of the public range through homesteading.

Furthermore, other Executive Orders seem to have no trouble using the term "selection" when it is appropriate. (E.g., cf. Exec. Order of Nov. 26, 1934, which speaks in terms of entry, selection, claim, withdrawal, or reservation with the language used in Exec. Order 6910 which speaks in terms of entry, location, sale and entry.) The language of Executive Order 6910 must, therefore, be construed to apply only to homestead and homestead entries and such a construction supports the conclusion that the language of section 1 of the Taylor Grazing Act expressly exempts state school indemnity selections from the operation of the act.

3. Circular No. 1346 Speaks Only to School Lands in Place. It Makes no Reference to School Indemnity Selections

Finally, the Secretary claims that Circular No. 1346 supports his assertion that the express exemption contained in section 1 must be restrictively construed to

only apply to school lands in place and not include school indemnity selections. This assertion is simply not true. Circular No. 1346 is merely a set of regulations governing gifts of land and state and private exchanges under section 8 of the Taylor Grazing Act. The sole subject this circular addresses with respect to school lands is whether school lands in place pass to the states. The circular provides:

> "The words 'Nothing in this Act shall be construed in any way . . . to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State' were obviously intended to preserve school sections, both surveyed and unsurveyed, included within the boundaries of a grazing district established under the provisions of the Taylor Grazing Act, in exactly the same status for the purpose of any grant to any State as the lands would have had had the Taylor Grazing Act not been passed and had the lands not been included in the grazing district." (55 I.D. 589 (1936).)
>
> "It follows, therefore, that neither surveyed nor unsurveyed school sections within the boundaries of a grazing district may for that reason only be offered as a basis for an equal area indemnity selection under the act of February 28, 1891 (26 Stat. 796). It also follows that the inclusion of unsurveyed school sections within a grazing district will not prevent the title to such lands from vesting in the State upon the acceptance of the plat of survey thereof by the Commissioner of the General Land Office.
>
> "Granted school sections owned by a State within or without the boundaries of a grazing district may be assigned by the State as a basis for an equal value

exchange, as provided in section 8 of the Taylor Grazing Act." (55 I.D. 192, 204–205 (1925).)

Similarly, in Circular No. 1398, the conclusion is stated:

"A grazing district is not a reservation within the meaning of the Act of February 28, 1891 (26 Stat. 796), and therefore school sections, surveyed or unsurveyed, within a grazing district, are not for that reason only valid base for indemnity school land selections under said act of 1891. The inclusion of unsurveyed school sections within a grazing district will not prevent the title to such lands from vesting in the State upon the acceptance of the plat of survey thereof by the Commissioner of the General Land Office." (55 I.D. 582, 589 (1936).)

Neither of these circulars make any mention whatsoever of the provisions of section 1 being limited to only school land grants in place and such a construction cannot be applied to these circulars.[6] There is no question that the exemption in section 1 was intended to apply to school lands in place. That was clearly one of the intentions of the exemption contained in section 1 of the act. But this does not mean this was the only intent of that section. To assert that merely because these regulations, which do not even purport to deal with school indemni-

[6] Such a construction seem to be contradicted, at least by implication, in the general explanation of the Taylor Grazing Act (55 I.D. 524) promulgating by the Secretary which seems to interpret section 1 very broadly. This explanation provides:

"*Construction of act.*—Nothing in the act is to be construed to impair any rights initiated under the public land laws, except as required by other provisions of the act. The creation of a grazing district will not defeat the grant, to a State, of lands heretofore or hereafter surveyed."

ty selections, and which confine themselves to exchange under section 8 of the Taylor Grazing Act, show such an exclusivity, obviously ignores the clear language and mandate of the statute.[7] Furthermore, the Secretary never explains how if a grazing district is not a "reservation" within the meaning of section 1 of the Act of February 28, 1891, it is a reservation which will render the land appropriated under section 2 of the very same act.

In conclusion, then none of the materials cited by the Secretary are sufficient to compel a contrary construction of the clear and unambiguous exemption which Congress provided in section 1 of the Taylor Grazing Act. The very breadth of this language which, by its terms, applies to "any lands which would have been part of any grant to any state" mandates the conclusion that school indemnity selections are from the provisions of the Taylor Grazing Act.

B. The Taylor Grazing Act as Enacted in 1934 does not Prohibit School Indemnity Selections

Even assuming arguendo that the explicit exemption contained in section 1 of the Taylor Grazing Act does not

[7] The language in section 1 which refers to lands heretofore or hereafter surveyed also cannot be construed as restricting the operation of the broad exemption for state grants in section 1 solely to school land grants in place. At the time the Taylor Grazing Act was enacted, the states were only entitled to select lands as indemnity for losses to the school land grant which had been surveyed. It is only recently that states have been allowed to select unsurveyed lands. (See Pub. Law 89-470 (1966).) Therefore, the limitation as to lands heretofore or hereafter surveyed applied with equal force to indemnity selections because unsurveyed sections could not be selected.

apply to school indemnity selections, the Secretary's argument still falls far short of the mark. His argument is centered around a single basic premise. That premise is that the 1934 enactment of the Taylor Grazing Act cut off all state indemnity selection rights. The significance of this distinction is that, if the 1934 act cut off all selection rights then the Secretary must show that the 1936 amendment to section 7 restored these rights which were already subject to the Taylor Grazing Act. On the other hand, if the 1934 act did not cut off all selection rights, the Secretary must prove that the 1936 amendment to section 7 was designed to expressly bring those previously exempted school indemnity selections within the purview of the Taylor Grazing Act. This he certainly cannot do.

In addition to the broad exemption provided by section 1 of the Taylor Grazing Act, Congress also added additional language to protect the rights of the states to select lands as indemnity for the loss of school land selections in place. This language provides:

> "Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter. . . ." (43 U.S.C., § 315.)

The import of this language is clear. Unless the act *expressly* provides otherwise the right of the states to initiate school indemnity selections remains as before.

And the 1934 act says absolutely nothing about school indemnity selections.[8]

The Secretary in his brief speculates that this language in section 1 was merely included to protect existing water rights but again the breadth of the language used by Congress betrays him. *Nothing* shall be *construed* in *any way* to diminish, restrict or impair *any* right which has been herefore or *hereafter* initiated . . . except as otherwise *expressly* provided for in this chapter. It is difficult to conceive how this section could be more broadly or less clearly drafted.

Furthermore, the Secretary's assertion that in spite of this language the 1934 act terminated all school indemnity selections is directly contradicted by the testimony of the then Secretary of the Interior before a congressional committee. This testimony occurred after the enactment of the 1934 act and the promulgation of Executive Order 6910 and was given by the Secretary before the House Committee on the Public Lands. Concerning a possible amendment of the Taylor Grazing Act, Secretary Ickes stated:

> "In regard to the matter of land exchanges with

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[8] As enacted in 1934, section 7 of the act reads in part:

> "That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permitee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof . . . ."

the State and others, I wish to assure you that the utmost dispatch will be used in fulfilling the exchange provisions of the law. The land grants which the States have received are an obligation which the Government should and intends to fulfill." (H. hgs. on H.R. 3019, *supra,* at p. 68.)

Solicitor Poole made a similar statement at a conference on proposed amendments to the Taylor Grazing Law held in Denver, Colorado, on February 13, 1935, and which was also presented to the House Committee. Solicitor Poole, who had testified numerous times on the Taylor Grazing Act and who was one of the prime movers of the bill stated:

". . . all I can say is what the Secretary said in his address yesterday, and what we stated to the committees when this bill was pending; and that is that we are going to keep faith with the States in satisfying all grants and indemnity rights. We are going to do that just as speedily as it is possible, and I assure you that there will be enough land, and land of the proper character [sic], to satisfy the States to take care of their unsatisfied grants." (*Id.,* at p. 156.)

These statements are entirely consistent with the fact that at no time in any of the testimony before either House of Congress on any of the bills regarding grazing did any member of the Department of the Interior testify that the Taylor Grazing Act would stop all school indemnity selections. Given this absence of testimony and given the statements of both the Secretary of the Interior and Solicitor Poole, it is difficult to imagine how the Secretary can now assert that the 1934 act can be construed to have entirely cut off all school indemnity

selections especially in light of the clear and unequivocal language which Congress used in section 1 of the Taylor Grazing Act.

C. The 1936 Amendment to Section 7 of the Taylor Grazing Act Cannot be Construed as Bringing School Indemnity Selections Within the Ambit of the Act

In 1936, Congress amended the Taylor Grazing Act to increase the acreage which could be included within grazing districts from 80,000,000 acres to 143,000,000. At the same time Congress amended section 7 of the act to read in pertinent part:

"The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lieu [sic], exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . ." (43 U.S.C., § 315(f).)

It is this amendment which the Secretary claims gives him discretion to classify lands as part of the school indemnity selection process. For a variety of reasons this amendment cannot be construed to give the Secretary any discretion in school indemnity selections.

1. The Only Rational Construction of the 1936 Amendment to the Taylor Grazing Act is That it is Limited to Private Lieu Selections

The Senate report regarding the 1936 amendment to section 7 is very explicit. It states:

> "It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available *for private entry* lands which are more valuable for other purposes than grazing." (Sen. Rept. No. 2371, 74th Cong., 2d Sess., June 15, 1936, at p. 2, emphasis added.)

This statement of the 1936 amendment is directed *solely* to private grants and lieu selections is an entirely reasonable construction of the language used in the statute. Throughout the years Congress has given to private parties both land grants and lieu selection rights. (See, e.g., *Hall* v. *Hickel* (D.C. Nev. 1969) 305 F.Supp. 723, rev. and remanded on other grounds, 473 F.2d 790 (9th Cir. 1973), cert den. 414 U.S. 828 (1973), involving "Valentine Scrip" lands; 25 U.S.C., § 334 (selection rights of Indians residing off of an Indian Reservation) and 43 U.S.C., § 274 (selection rights to be exercised by veterans).)

A number of these selections or entries require land to be classified as agricultural and opened to homesteading before they can be exercised. (See, e.g., *Bronken* v. *Morton* (9th Cir. 1973) 473 F.2d 790, 796, 797; *Finch* v. *U.S.* (10 Cir. 1967) 387 F.2d 13, 16.) Therefore, they fall within the direct purpose of the Taylor Grazing Act which was to prevent the destruction of public range lands through homesteading.

To construe the language of section 7 to encompass not only these private lieu selections which are clearly within the purview of the Taylor Grazing Act, but also state school indemnity selection does a grave injustice to the language used by Congress in section 7 itself and also to the statement in the Senate report that the amendment was limited to private entities. The court of appeals carefully considered the language of section 7 and held, for a variety of reasons that this language could not be construed to bring school indemnity selections within the ambit of the Secretary's classification authority. The court noted that the primary interest of section 7 was directed to "uses" and that there is no way that school indemnity selections could be considered as "uses." (586 F.2d at p. 772.) The court also noted that the language in section 7 does not speak directly to school indemnity selections but speaks to the much broader general area of lieu selections in general. This general statement as to lieu selections is at variance with the specific criteria contained in 43 U.S.C., section 851 and 852 and the special act must control over the general by virtue of both the rules of statutory construction and also

the trust obligation under which the state holds these lands. (*Id.,* at pp. 766–768.)

The Secretary disputes the limitation placed on the 1976 amendment by the court of appeals, claiming that the testimony of Mr. Page, a private attorney from Arizona shows that Congress intended an opposite result. We seriously doubt whether the testimony of but a single witness before the committee considering a predecessor bill which was substantially changed prior to its ultimate enactment can alter the explicit limitations contained in the report of the complete Senate as to the effect of the bill *actually passed.*

Additionally, the Secretary misconceives what he is required to prove. As we have already shown, the 1934 act can in no way be construed to have eliminated school indemnity selections entirely and, therefore, the Secretary must prove that the 1936 amendment was specifically designed to include school indemnity selections within the ambit of the Taylor Grazing Act. Neither Mr. Page's testimony nor any of the materials cited by the Secretary shows such an intent.

2. Even if the 1936 Amendment to Section 7 is Ambiguous it Must be Construed in Favor of the States

Even if we accept for the sake of argument that the 1936 amendment to section 7 is ambiguous as to whether it was intended to apply to school indemnity selections, in addition to private lieu selections and grants, the states must be given benefit of the doubt. This is mandated by the well-established rule of construction that

school land grant legislation enacted by Congress must be construed liberally (in favor of the states) rather than restrictively. (*Wyoming* v. *United States, supra,* 255 U.S. at 508.) To allow the Secretary such discretion that he could utterly thwart not only individual selections but also the entire indemnity selection process through his classification authority would be a construction of this statute entirely at variance with this well-established rule. The conclusion therefore is inescapable that the 1936 amendment to section 7 must be construed to apply only to private land grants and lieu rights. Such a construction is the only way the various parts of the Taylor Grazing Act can be harmonized.

D. Recent Judicial Decisions Have Recognized that the Taylor Grazing Act did not Alter the Holdings of the *Payne* and *Wyoming* Cases

Returning again to the Secretary's central theme that this Court's decisions in the cases of *Payne* v. *New Mexico, supra,* 255 U.S. 367; and *Wyoming* v. *United States, supra,* 255 U.S. 489 have been legislatively overruled by the enactment of the Taylor Grazing Act, recent decisions of the federal courts have affirmed that the decisions in these cases are still good law. Additionally these cases reaffirm that section 7 must be construed to apply only to *private* entries.

In *Lewis* v. *Hickel* (9th Cir. 1970) 427 F.2d 673 cert den. 400 U.S. 992 (1971), the issue was one of the Secretary's discretion under the private exchange provisions of section 8 of the Taylor Grazing Act. The private par-

ties relied on the case of *Payne* v. *New Mexico*. The court, however, carefully distinguished the *Payne* case. It said:

> "Appellants place strong reliance upon *Payne* v. *New Mexico* . . ., a case involving the Secretary's denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. However, that case and other like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with. *Hence, the power conferred upon the Secretary was merely 'judicial in its nature'* (255 U.S., at 371, 41 S.Ct. 333) in the sense that his only function was to ascertain whether the specific conditions had been met.
>
> "Under the exchange provisions of the Taylor Grazing Act, the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress." (*Id.,* at p. 676, emphasis added.)

Similarly, in *Willcoxson* v. *United States* (D.C. Cir. 1963) 313 F.2d 884, the question of the Secretary's discretion under section 7 of the Taylor Grazing Act was raised in relationship to sales under the Isolated Tracts Act. The private parties relied on *Wyoming* v. *United States*. The court, however, again rejected this contention by carefully distinguishing the *Wyoming* case. The court said:

> "We agree with the court below that such cases are inapposite since they arose under statutes from the Isolated Tracts Act. *In those statutes Congress chose a method of granting interests in public lands whereby the recipients of the grants had only to prove they met the statutory requirements in order to obtain rights in the lands.* Hence, '[t]he power confided to [the Secretary] was not that of granting or denying a privilege . . . but of determining whether an existing privilege conferred by Congress had been lawfully exercised.' . . . But in the Isolated Tracts Act Congress chose a wholly different method for disposing of interests in the public domain . . . . Congress entrusted to the Secretary's discretion the initial decision whether or not to sell isolated tracts of the public domain. The distinction is between a positive mandate to the Secretary and permission to take certain action in his discretion." (313 F.2d at 888, emphasis added.)

While these cases are not dispositive of the issue before this Court as to whether *Payne* and *Wyoming* have been overruled by the enactment of the Taylor Grazing Act because that issue was not directly before the courts, it is significant that in both cases the court took great pains to distinguish *Payne* and *Wyoming*. Obviously, if the courts had felt that *Payne* and *Wyoming* had been overruled they would have said so. But there is not even the slightest suggestion of this anywhere in the decisions. Instead the court treated the *Payne* and *Wyoming* cases as stating entirely good law in spite of the intervening enactment of the Taylor Grazing Act.

Therefore, while not entirely dispositive of the issues before this Court, both *Lewis* v. *Hickel* and *Wilcoxon* v. *United States* certainly suggest that the Taylor Grazing Act did nothing to alter the rule enunciated by this Court in the *Payne* and *Wyoming* cases that the Secretary is limited to a ministerial function in approving

school indemnity selections and that the explicit provisions of section 851 and 852 still remain the sole criteria the Secretary may use in determining the validity of a state school indemnity selections.

E. The Congress, the Courts, the Attorney General and the Solicitor of the Department of the Interior Have all Rejected the Secretary's Claims of Discretion

The Secretary has sought to buttress his argument in this case by administrative construction. He has sought to show that the Taylor Grazing Act is but the culmination in a process by which Congress has granted him increasingly broad powers in school indemnity selections and that the only departures from this rule were this Court's decisions in the *Payne* and *Wyoming* cases. This is not true. On a number of occasions both before and after passage, the Taylor Grazing Act, Congress, the courts, the Attorney General, and even his own solicitor have restricted the Secretary's discretion.

1. Recent Decisions Have Tended to Reduce the Secretary's Discretion

A few examples of recent attempts by the Secretary to claim discretion should suffice to show that the continuum claimed by the Secretary does not exist.

The first example has already been detailed in this brief. The Secretary claimed he had discretion to approve or deny school indemnity selections. This Court stopped that attempt by its decisions in *Payne* v. *New Mexico* and *Wyoming* v. *United States.* (See *Supra,* pp. 29–32.)

Following passage of the Taylor Grazing Act the Secretary by exercise of his inherent powers sought to avoid the explicit 80,000,000 acre limitation for lands to be included in grazing district contained in section 1 of the act. He took this action in spite of the veto of a bill which would have increased the limit to 143,000,000. His claim was however, rejected by the Attorney General (38 Cal-.Ops.Atty.Gen. 350 (1935).

The next controversy centered around the state exchange provisions in section 8 of the Taylor Grazing Act. The Secretary contended that he had discretion under section 8 of the act in state exchanges. Congress took a different position as seen from the testimony before the Senate Committee on the Public Lands and Surveys:

> "Senator Adams. Mr. King, there is no trouble of doing it in the manner, but this says it shall be done when the State applies. Of course, in the manner may be the same, but the necessity for it is different, and it is not discretionary.
>
> "Mr. King. I think, Senator, that is contrary to the opinion of Solicitor Margold.
>
> "Senator Adams. I do not care. You know who is the final authority in this matter. Congress is the final authority, and we can very readily make this so that the Solicitor will understand it.
>
> "Senator Carey. We can clear it up.
>
> "Senator Adams. Yes; if there is any doubt about it." (S. Hgs. on S 2539, *supra,* at p. 48.)

Congress did, in fact, "clear it up" by amending section 8 of the Taylor Grazing Act to take away virtually all of the Secretary's discretion. (See 49 Stats. 1976, (1936).) Still the controversy did not end there. The Secretary

then posed the question of whether he could still reject a state exchange under section 8 by resort to his asserted classification authority under section 7 of the Taylor Grazing Act. This contention was rejected by the Solicitor for the Department of the Interior. (See 61 I.D. 270 (1961).)

Finally, in 1962, the Secretary, pursuant to a solicitor's opinion attempted to adopt extremely broad definition of "producing or producible status," as that term used in 43 U.S.C., section 852. The effect of the adoption of such a definition would have denied the State of Utah certain lands selected for indemnity for losses to the school land grant and would have made it extremely difficult for the states to select mineral lands subject to a lease or permit. (70 I.D. 71 (1962).) The Attorney General rejected such a construction and decided Utah was entitled to the lands. (70 I.D. 65 (1963).)

These decisions show that the continuity claimed by the Secretary does not exist. Recent congressional action has increasingly liberalized and granted to the states greater rights in the selection of school indemnity lands. For example, in 1958, Congress amended section 852 to allow the states to select mineral lands as indemnity and allowed the states to select lands withdrawn under Executive Order 5327 (72 Stats. 928 (1958); and in 1966 Congress allowed the states to select unsurveyed lands as well as surveyed lands. (80 Stats. 220 (1966).) The recent congressional trend would seem to be, therefore, the exact opposite of that claimed by the Secretary. Congress has consistently liberalized the states' right to se-

lect lands as indemnity for losses to their school land grants.

2. The Administrative Construction in this Case is Neither Reasonable nor Controlling

While the courts normally will accord some deference to the administrative construction given a statute, the courts are and must be the final arbiters of a statute. As this Court has stated, the courts:

> "'. . . are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' . . ." (*Volswagenwerk* v. *FMC* (1968) 391 U.S. 261, 272.)

All the decisions cited by the Secretary are bootstrapped on dicta in but a single decision by the Board of Land Appeals, the decision in *State of Arizona* (55 I.D. 249 (1935)). In that case, the State of Arizona had made an indemnity selection prior to the passage of the Taylor Grazing Act, however, the base was defective. Following passage of the act the state sought to amend its selection by substituting valid base. The board allowed the amendment and, therefore, did not need to consider the question of whether the Taylor Grazing Act deprived the states of all selection rights. But, curiously, the board stated that the effect of the Taylor Act was to cut off entirely all indemnity selections. It is this bit of dicta which has been the sole authority in all subsequent decisions. No authority was cited for this proposition and the decision totally ignores the clear and unequivocal

language in section 1 of the Taylor Grazing Act which exempts school indemnity selections from the purview of the act and the language in section 1 which provides that all rights remain the same unless expressly altered by the act. Surely such a decision with no authority or discussion has no reasonable basis in law and cannot be controlling in this case.

Finally, we fail to see how the Secretary can rely on administrative construction in this case. In a memo to the Secretary in 1962, the associate solicitor stated that there was no basis for an equal value rather than an equal acreage rule. (Quoted at 586 P.2d 762.) This has been the administrative construction for over 160 years. If the Secretary wishes to rely on administrative construction, he should rely on equal acreage not equal value.

IV. Even Assuming Arguendo that the Secretary has Discretion, this Discretion Cannot Extend to Equal Value

The court of appeals carefully reviewed the breadth of the discretion claimed by the Secretary in this case and held that even if he had such discretion it could not be unlimited. In rejecting this assertion, the court said:

> "The Secretary argues that he has authority under Section 7 to cancel the 'in lieu' selections based upon his discretionary power to 'classify,' but he has not deemed it necessary to spell out the scope or extent of the 'classification' power in the case at bar. In fact, he contends that Section 7 'puts no restrictions on the substance of secretarial discretion.' [Brief of Appellant, p. 31.] The Secretary's contention is erroneous.

> The 'classification' criteria were spelled out by the Congress for other types of public land dispositions under the 1936 amendment, i.e. homestead entries and exchange of private land. We agree with Utah that, 'It makes no sense to suppose that Congress would spell out conditions and criteria for the exchange of private land for federal land, but would at the same time grant to the Secretary unlimited discretion, with no criteria or guidance, to deny school indemnity selections by classifying the land for retention in federal ownership.' [Brief of Appellee, p. 60.] The breadth and scope of the right of 'classification' claimed by the Secretary creates the very vagueness condemned in *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926). There the Court held that a statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. *See also; Boyce Motor Lines, Inc.* v. *United States,* 342 U.S. 337 (1952); *Sutherland Statutory Construction,* 4th Ed., Vol. 1A, § 21.16." (586 F.2d at 772–773.)

Even if the Secretary has classification authority, therefore, it must be limited and judicial decisions have already held that it cannot extend to imposing an equal value rule.

A. The Checkered History of the Equal Value Policy

This so-called equal value rule is not really a rule but a policy. It has never risen to the status of a regulation nor have we or the courts been able to find any criteria on which the Secretary is to evaluate the lands to determine value. This in part is due to the history of the equal value policy.

As has already been shown in 1966, Congress rejected an amendment to section 852 which would have imposed the equal value rule on the states. (*Supra,* at p. 28.) Notwithstanding this rejection in 1967, the Secretary claims to have adopted the equal value rule as a policy. Evidently this policy was not generally known or published. In 1974, the Secretary sent a letter to Governor Rampton of Utah announcing the equal value policy would be applied to Utah's selections in spite of the fact that some of the selections had been already pending for nine years and the policy adopted for seven years.

This policy has never risen to the status of a regulation and evidently no guidelines or criteria have ever been published regarding this policy. The district court and the court of appeals took a skeptical view of this policy.

> "At no time or in anywise has the Secretary seen fit to inform the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate—based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the 'equal value' urged by the Secretary are nonexistent, or otherwise so vague as to presently fall within the realm of guesswork or speculation." (586 F.2d at 760.)

B. Even Assuming that Classification Authority Exists, Existing Case Law Clearly Establishes it does not Extend to Equal Value

The case of *Bronken* v. *Morton, supra,* 473 F.2d 790, is

dispositive of the issue of whether the Secretary's classification authority (even if it applies here) extends to an equal value policy. In *Bronken* v. *Morton,* private parties were the holders of certain scrip rights entitling them to select public lands. In 1966, Congress had passed a statute which imposed an approximate equal value rule on these rights whereby they could be exercised for the approximately average value of lands for which such rights had been historically exercised. Rights exercised before a certain date were not, however, subject to the rule but only to "existing law." Some of the private parties exercised their rights prior to the specified date but the Secretary declined to issue them patents on the grounds that the lands selected were of greater value than maximum values set by a regulation adopted 10 years earlier. This regulation was substantially similar to the equal value policy the Secretary asserts here. The court rejected the Secretary's contention that he could apply an equal value rule in spite of the fact that the court recognized the Secretary had the power to classify the lands under section 7 of the Taylor Grazing Act.

The clear holding of the *Bronken* case is that the Secretary's classification authority under section 7 of the Taylor Grazing Act does not extend to imposing an equal value test. If as *Bronken* holds the Secretary cannot do so by regulation, how can he do so by policy? And if he cannot do so when Congress has specifically authorized him to do so after a certain date how can he do so when Congress has refused to enact such a law?

The *Bronken* case is directly on point and if it does not

collaterally estop the Secretary, it is at least dispositive of the issue here. Under existing law, assuming the Secretary has the authority to classify lands under section 7 of the Taylor Grazing Act this authority does not and cannot extend to an equal value rule.

CONCLUSION

If the Secretary's position is upheld the states will be forced to use a hunt and peck method to satisfy their school indemnity selections. They will be forced to appraise and evaluate for minerals both base and the selected lands. Then, after initiating the selection process, they would have to wait patiently while the Secretary decides in his uncontrolled discretion whether to give the selected lands to the states. If he decides not to, the process will have to begin all over again, at the expense of the states and with no guarantee it will be successful.

The Public Land Law Review Commission in 1970, considered the very issue which is currently before this Court. Their finding was:

> "Notwithstanding the progressive statutory liberalization of the states' rights to select indemnity lands, the Department of the Interior (because of a view that it must preserve the bulk of the public domain in Federal ownership) has tended to resist lieu selections when the Bureau of Land Management believes the value of the selected land exceeds the value of the lost land.
>
> "It is apparent from the preceding discussion that present law affords no explicit support for an 'equal value' test. Indeed, the executive branch sought to have the 1966 lieu selection amendments include a

> provision denying the states the right to select lands valuable for leasable minerals, unless the lost mineral lands were of equal value. Neither the House of Representatives or the Senate approved the proposal and the Senate report rejected the suggestion as 'extraneous.'" (One Third of the Nation's Land, A Rep. to the President and the Cong. by the Pub. Land L. Rev. Comm., p. 246 (1970).)

The commission recommended that federal agencies should give preference to satisfaction of outstanding state grants and that these should be completed within a short period of time. (*Id.*, at pp. 243, 245.)

This recommendation is even more important today. With current pressures on the states to provide a high degree of governmental services at reduced cost, the school land grants represent an important revenue source for the states. The western states with further selection rights remaining are doubly burdened by the Secretary's importance of the equal value rule because a large portion of the lands within their borders remains in federal ownership and off the tax rolls. But the states are not asking for a windfall. We are only asking for what the other states have already received and was promised in a bargained for exchange, indemnity for school lands which were lost through no fault of our own.

The district court and the court of appeals carefully considered the issues in this case and held the states were entitled to select their school indemnity lands free of secretarial discretion. We ask that this Court do the same and affirm the judgment of the courts below.

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